STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from The Michigan Court of Appeals
Per Curiam Opinion; Honorable Pat M. Donofrio, Presiding

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC, a Michigan limited liability company,

Petitioner/Appellant,

v

TOWNSHIP OF MARION,

Respondent/Appellee.

Supreme Court Docket No. 130698

Court of Appeals No. 262437

Michigan Tax Tribunal Docket No. 307906

MICHIGAN ASSOCIATION OF HOME BUILDERS' BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER/APPELLANT HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

130698

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae, Michigan Association of Home Builders, states that this Court has jurisdiction pursuant to MCR 7.301(2) (review by appeal following decision of Court of Appeals) and MCR 7.302, Petitioner having filed its Application for Leave to Appeal on March 14, 2006, from the Per Curiam Opinion of the Court of Appeals entered January 31, 2006. This Court has authority to receive amicus curiae briefs consistent with MCR 7.306(D), upon motion granted, and has specifically invited "groups interested" in issues relative to these proceedings to file amicus briefs pursuant to its June 30, 2006 Order.

STATEMENT IDENTIFYING JUDGMENT AND ORDERS APPEALED FROM AND RELIEF SOUGHT

Appellant Highland-Howell Development Company, LLC ("Highland") seeks leave to appeal from the Court of Appeals' unpublished January 31, 2006 Opinion in *Highland-Howell Development Company, LLC v Township of Marion*, and from Michigan Tax Tribunal ("MTT") Orders, as identified in Highland's Application for Leave to Appeal (herein, the "Highland Brief"). This Court's June 30, 2006 Order in this matter invited "groups interested in the determination" of issues raised to move for leave to file briefs amicus curiae in connection with pending oral argument on whether this Court will grant Highland's application for leave or take other preemptory action under MCR 7.302(G)(1).

> This Court specifically requested briefing concerning:
>
> The manner in which a property owner subject to special assessment for a planned improvement may seek relief when there is a subsequent change to the plan that materially affects the benefit to the owner's property. . . .

Mich S Ct Order, Docket No. 130698 (June 30, 2006).

STATEMENT OF QUESTIONS PRESENTED

I. THIS COURT REQUESTED BRIEFING ON "THE MANNER IN WHICH A PROPERTY OWNER SUBJECT TO SPECIAL ASSESSMENT FOR A PLANNED IMPROVEMENT MAY SEEK RELIEF WHEN THERE IS A SUBSEQUENT CHANGE TO THE PLAN THAT MATERIALLY AFFECTS THE BENEFIT TO THE OWNER'S PROPERTY." THE RESPONSE TO THIS QUESTION NECESSARILY IMPLICATES THE ISSUE OF WHETHER THIS COURT MAY REDRESS THE GRIEVANCES OF A PROPERTY OWNER SUBJECT TO A SPECIAL ASSESSMENT, WHERE MORE THAN 30 DAYS AFTER CONFIRMATION OF THE ASSESSMENT ROLL, THE ASSESSING MUNICIPALITY ALTERS THE PLANNED IMPROVEMENT TO THE EXTENT THAT IT PRACTICALLY REMOVES ALL BENEFIT CONFERRED BY THE ASSESSMENT, UNDER CONSTITUTIONAL DUE PROCESS OR HISTORICAL EQUITY PRINCIPLES.

Respondent/Appellee Marion Township presumably answers "No."

To the extent they have been presented with the issue, all lower courts and the Michigan Tax Tribunal apparently answer "No."

Petitioner/Appellant Highland-Howell Development Company, LLC answers "Yes."

Amicus curiae the Michigan Association of Home Builders answers"Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

A. The Michigan Association of Home Builders

Since 1948, the Michigan Association of Home Builders (the "Home Builders") has been the collective voice of the building industry in the state of Michigan. Due to the extraordinary importance of the home building industry to the economy of Michigan, the Home Builders have advocated for: private property rights; consistency and predictability in builders' interactions with government; building, construction and work site safety; and have consistently raised issues of fundamental fairness, justice and equity as they apply to home builders and the building trades. A primary goal of the Home Builders is to provide the opportunity for all Michigan citizens to own or rent affordable and safe housing. Thus, the Home Builders take tremendous pride in their collective work and are always mindful of the key role they play in supporting the "American dream." When this dream is threatened by arbitrary and unjust government action, the Home Builders are duty-bound to weigh in. The scenario presented in this litigation presents just such an occasion.

B. Overview of the Case

The practical effect of the Court of Appeals' decision in this matter – published or otherwise – will be to provide tacit court approval of a governmental "bait and switch" in the special assessment context. While the Home Builders do not import any ill motive on the officials of Marion Township or other conscientious local officials across the state, the decision in this case effectively provides a "green light" for local governments to wait until 31 days have passed following confirmation of a special assessment roll, change their improvement plans without notice, and completely avoid redress under the proportionality provisions of the Public Improvements Act, or under the due process principles upon which statutory proportionality guarantees are based. Such

a result offends fundamental principles of due process, is wholly inequitable, and violates the fundamental social compact between citizens and their government. This Court cannot countenance the operative rule that will prevail if the Court of Appeals Opinion is allowed to stand, being: on day 31 following confirmation of an assessment roll, "all bets are off." This Court has the authority and the duty to cut through the technical procedural posture of this case to reach the merits.

This brief focuses on two areas: the historical constitutional due process principles upon which the Public Improvements Act, MCL 41.721 et seq, and its predecessors are based, and on remedies available to this Court under due process and general equity principles. This brief also discusses various remedial provisions in the Public Improvements Act, and traces their historical evolution.

II. STATEMENT OF FACTS

The Home Builders agree with and adopt the Statement of Material Proceedings and Facts as presented by Highland. Indeed, both the Highland Brief and the Township of Marion's Brief in Opposition to Highland's Application for Leave to Appeal (the "Township Brief") largely rely on stipulated facts. However, because party briefs were necessarily dominated by procedural issues, the Home Builders wish to put certain record facts into perspective, particularly those that concern the scope and significance of the Township's unilateral "day 31" plan change.

In simple terms, the Township's plan alteration, which eliminated an approximately mile-long sewer trunk line traversing the Highland property east to west, was a massive and substantial change in plans from what Highland and the Township originally agreed upon. Contrary to the position asserted by the Township – to the effect that Highland cannot object because its

property is still served by sewer service[1] – the Township's altered plan fundamentally changed the entire development equation for the subject parcels.

First, Highland's roughly 200-acre property, consisting of six separate parcels, is approximately one mile wide, east to west.[2] This is not a case of minor plan deviation, such as where a homeowner expected sewer service in front of their property and the plan is changed to locate the service on the side of the property. This is not a case of a *de minimus* alteration, such as relocating a curb cut or eliminating a turn lane. This is not a case where a planned sewer line was moved slightly, requiring minor changes to the length of feeder lines. Instead, unilateral elimination of approximately a mile of sewer trunk line changed the fundamental nature of the bargain the parties struck.

To exemplify the scope of the Township's "day 31" plan change, attached at Exhibit A is an excerpt from the Township's original plan as stipulated in MTT Docket No. 261431. It depicts the proposed sewer trunk line roughly traversing Highland's property. The applicable portion of the special assessment district at issue is represented by cross-hatching. Exhibit B is the same map as Exhibit A, with Highland's property highlighted in yellow, and with Interstate 96 and

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1 See, Township Brief, p. 20, stating it is "absurd" for Highland to argue that "it has not been served with sewer service." The Township describes this as a "wholly unfounded premise." The Township apparently argues (albeit not very seriously) that because some sewer line touches some part of one of Highland's several contiguous parcels, as opposed to traversing their mile-long span, Highland has nothing to complain about. This strains credulity when considered against the realities of developing a 200-acre parcel of raw land that spans a mile.

2 The Tax Tribunal, in its Opinion in Docket 261431, 2004 WL 2251148, ¶ 16 ((Tribunal's Findings of Fact) (Mar 19, 2004), indicated that the Highland properties consisted "of approximately 200 acres located north of Interstate 96 between Pinckney Road and Lucy Road in Marion Township." By reference to publicly available maps and documents in the various appendices filed by the parties, this Court may take notice of the fact that Lucy Road and Pinckney Road are roughly parallel roads a mile apart.

the various sewer lines labeled and highlighted. The originally agreed-upon east-west trunk line, as labeled on Exhibit B, clearly would have provided sewer access across the entire mile long span of Highland's parcels. Exhibit C roughly depicts, based on representations from Highland's counsel, the sewer line as constructed.[3]

As comparison of Exhibits A, B and C show, Highland's property, if all six parcels are deemed as one, is technically "served" by sewer lines under the amended plan. However, as shown on Exhibits B and C, the Township eliminated the nearly one mile trunk line, the value of which it clearly assessed against Highland. The record is uncontested that Highland deemed the $3.2 million assessment a fair and proportionate price to pay for a sewer trunk line that traversed their parcels from east to west. However, the Township's "day 31" elimination of the agreed-upon east-west trunk line in favor of installing a line (roughly) on the western edge of Highland's parcels, entirely changed the proportionality of the $3.2 million assessment in terms of benefits and burdens.

In a practical sense, Highland, by agreeing to (or not challenging) the original assessment roll, could plan to develop its properties by utilizing relatively short feeder lines to the east-west trunk line their assessment was to finance. Even though Highland is still paying for this trunk line (i.e., the assessment was never reduced), the potential for any development on these parcels was radically and fundamentally altered when the Township unilaterally, and without notice or hearing, eliminated that trunk line. As a result, the property sits idle while the developer, Highland, continues to pay the assessment and other carrying costs. Indeed, as briefing by the parties makes clear, the Township has admitted that it saved $750,000 to $800,000 by eliminating this trunk

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[3] Exhibits B and C were highlighted and labeled by counsel for the Home Builders, based on facts that were part of the stipulated record between the parties in various proceedings below.

line. However, it did not reduce the amount of the assessment accordingly. Procedural issues aside, this state of facts should have shocked the conscience of every court and tribunal below.

III. ARGUMENT AND LAW

A. WHEN THERE IS A SUBSEQUENT CHANGE TO A PLANNED IMPROVEMENT UNDER A SPECIAL ASSESSMENT THAT MATERIALLY AFFECTS THE BENEFIT CONVEYED BY THE ASSESSMENT, AND WHERE THAT CHANGE IS MADE WITHOUT NOTICE, AN OPPORTUNITY TO BE HEARD, PROPORTIONALITY BETWEEN BENEFITS AND BURDENS, OR OPPORTUNITY FOR REDRESS, IT VIOLATES STATE AND FEDERAL DUE PROCESS GUARANTEES.

1. Standard of Review.

The standard of review in this matter is *de novo* as it involves the interpretation and application of a statute. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000) (citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000)). This Court reviews constitutional questions *de novo*. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

2. The Township's "Day 31" Plan Alteration, Without a Corresponding Reduction in the Assessment, Deprived Highland of a Property Interest Without Due Process of Law in Violation of the State and Federal Constitutions.

a. The Proportionality Guarantees in Michigan's Public Improvements Act and Other Special Assessment Schemes Generally Have Their Roots in Fundamental Due Process Principles, Which Were Violated When the Township Unilaterally, and Without Notice, Reduced the Fundamental Benefit Conferred.

The Fourteenth Amendment of the United States Constitution provides that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." Likewise, the Michigan Constitution provides that: "No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963 Art I, § 17.[4] These due process clauses confer both substantive and procedural rights. *United States v Salerno*, 481 US 739, 746 (1987); *People v Sierb*, 456 Mich 519, 524, n 8; 581 NW2d 219 (1998).

The substantive components of due process principles guard against "certain government actions regardless of the fairness of the procedure used to implement them." *Sierb*, 456 Mich at 523 (quoting *Daniels v Williams*, 474 US 327, 331 (1986) (internal quotations omitted). The gist of substantive due process protection, as this Court has frequently noted, is to guard against "the arbitrary exercise of governmental power." *Sierb*, 456 Mich at 523 (citing cases). In practically every instance, and specifically in the context of special assessment challenges, the federal and state due process clauses have been found to offer the same protection to property owners. *Ridenour v Bay County*, 366 Mich 225; 114 NW2d 172 (1962) (action involving validity of special assessment district and challenging notice by publication); *Saxon v Dept of Social Services*, 191 Mich App 689,

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[4] Michigan's Constitution also guarantees that "the right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." Const 1963 Art I, § 17.

698; 479 NW2d 361 (1991) (finding Michigan and federal constitutions offer the same guarantees of due process). Further, it is axiomatic, based on supremacy and federalism principles, that a state cannot offer less due process protection than the minimum established under the United States Constitution. Indeed, as is made clear by cases cited by all parties in their respective briefs, and by *Sierb*, 456 Mich 519, and *Ridenour*, 366 Mich 225, this Court frequently relies upon the federal due process jurisprudence – especially from the United States Supreme Court – in analyzing due process challenges to government action.

Section 5 of the Public Improvements Act, MCL 41.725(1)(d), contains the statutory "proportionality" provision, which basically requires that the burden imposed by a special assessment be roughly aligned with the benefit conferred, insofar as the individual property is concerned, and insofar as the benefit conferred on particular property relates to the benefits conferred upon the whole. Under Section 5, the amounts taxed to each parcel:

> . . . shall be the **relative portion** of the whole sum to be levied against all properties of land in the special assessment district **as the benefit to the parcel of land bears to the total benefit to all parcels of land** in the special assessment district.

MCL 41.725(1)(d) (emphasis added). This bedrock proportionality principle within the Public Improvements Act is not merely a creature of legislative benevolence or enlightenment; in historical terms, it is compelled by due process principles as articulated by the United States Supreme Court. It is no accident that special assessment schemes across the country either contain an express proportionality provision, or the jurisprudence of their state courts insert it based on due process principles.[5]

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[5] For example, see *Bell v City of Topeka*, 220 Kan 405, 419; 553 P2d 33 (1976), holding that even where the state special assessment statute does not textually require

A leading special assessment due process case – if not the "granddaddy" of them all – is *Village of Norwood v Baker*, 172 US 269 (1898). *Norwood* is particularly illuminating in that it contains thoughtful and thorough analysis of assessment issues by Justice Harlan, with significant reliance on state supreme court jurisprudence (including Michigan), and was authored during the relative infancy of the federal Fourteenth Amendment.[6] At issue in *Norwood* was the constitutionality of an Ohio village's special assessment and exercise of eminent domain powers, in connection with the village taking a portion of the respondent's property to extend a street and specially assessing the owner for the street improvement, and the costs of the condemnation action, in an amount that exceeded the compensation made for the property taken. 172 US at 270-71.

In analyzing the constitutionality of these proceedings under due process principles, along with analyzing the procedures of the village *vis-a-vis* controlling Ohio statutes, the Court articulated a number of proportionality and notice principles – good to this day – governing special assessments. In so doing, the *Norwood* Court made it clear that assessment notice, proportionality and redress principles have a due process pedigree. Specifically, as to proportionality and redress:

> [T]he power of the legislature in these [assessment] matters is not unlimited. There is a point beyond which the legislative department, even when exercising the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefitted, and, therefore, the owners do not, in fact, pay anything in excess of what they received by reason of such improvement. But the guarantees for the protection of private property would be seriously impaired, if it were established as a rule

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proportionality, "if the burden imposed is entirely disproportionate to the benefits received, courts will, under their equity powers, grant relief."

6 The Fourteenth Amendment became effective in 1868. Erwin Chemerinsky, Constitutional Law (1997), Appendix p. 1051.

> of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of this country.

Norwood, 172 US at 278-79. Again, as to proportionality and redress, the assessment cannot be made "without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received." *Id.* at 279. In simple terms, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him [or her] is, to the extent of such excess, a taking under the guise of taxation, of private property for a public use without compensation." *Id.*

The theory underlying this principle, which the Court ties to simple contractual concepts, is that property will enjoy an increased value from the improvement with "the enhancement in value being the consideration for the charge." *Id.* (quoting *Ill Cent Railroad Co v Decatur*, 147 US 190, 202 (1893)) (internal quotations omitted).

In reliance on Justice Thomas Cooley's taxation treatise,[7] the *Norwood* Court found that "[t]here can be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public uses without compensation." *Norwood*, 172 US at 280 (quoting Cooley on Taxation; internal quotations omitted). The Court also observed that the proportionality concept "had its foundation in those elementary principles of equity and justice which lie at the root of the social compact. . . ." *Id.* These principles, the Court observes, "must be recognized as essential for the protection of private property against the arbitrary action of government." *Id.* at 282.

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7 Cooley, Taxation (2nd Ed), Chp 20.

Just a few years later, the United States Supreme Court affirmed an assessment scheme of the City of Portland, Oregon, as: it was based on a proportionate share of the cost of improving a street; the costs were apportioned according to the benefits received; the city charter provided for a hearing on the question of benefits to the property owner prior to formation of the special assessment district; and it also provided for notice and an opportunity to contest the assessment itself. *King v City of Portland*, 184 US 61 (1902) (finding no due process violation for proceedings that met proportionality principles and due process minimums of notice and an opportunity to be heard at various stages). Likewise, notice and proportionality were key components to the U.S. Supreme Court affirming a City of Detroit street improvement assessment scheme in *Goodrich v City of Detroit*, 184 US 432 (1902). The Supreme Court reiterated similar principles in *Soliah v Heskin*, 222 US 522, 523 (1912), holding that due process was not offended in drainage proceedings provided that "notice is given and an opportunity to be heard [is] afforded the landowner before the assessment becomes a lien against his [its] property."

Following *Soliah*, in 1912, the U.S. Supreme Court appears to have declined to revisit the due process issue in the context of special assessments. Since that time, the bulk of special assessment jurisprudence resides in the states. It is probably a safe historical presumption that the Court said about all that needs to be said on the issue: the essential due process guarantees in the special assessment context require notice, an opportunity to be heard, proportionality between burdens and benefits, and an opportunity for redress. A scheme that fails to comport with these minimums is unconstitutional.

As these principles are applied to the case before this Court, it is clear that Highland had notice of, and an opportunity to participate in, public hearings concerning the Township's initial

creation of the special assessment district. It has been stipulated that Highland did not protest or challenge the proceedings following confirmation of the 1996 assessment roll, as Highland deemed the proposed project (i.e., the east-west trunk line) and the $3.2 million assessment to strike a fair and generally proportionate balance between burdens and benefits. However, when the Township unilaterally eliminated Highland's east-west trunk line from the plans, both the due process-based notice and proportionality requirements were violated. Post-deprivation redress has also been denied, as this "day 31" change in the Township's plans (i.e., outside the 30-day period to contest assessments in "a court of competent jurisdiction" under MCL 41.726(3)), has resulted in courts and tribunals failing or refusing to address the proportionality requirement under MCL 41.725(1)(d), or under constitutional due process principles. Thus, the lower courts and tribunals have allowed the Township to kill four due process "birds" (notice, opportunity to be heard, proportionality, and redress) with one stone.

As the above-cited authorities make clear, a disproportionate assessment, or an assessment which is materially higher than the burden conveyed, effectively results in one property owner unjustly bearing a burden that must be shared by others. As Justice Harlan eloquently recited over 100 years ago, "the guarantees for the protection of private property would be seriously impaired if . . . [disproportionate assessment burdens and benefits] could not be questioned by him in the courts of this country." *Norwood*, 172 US at 279.

b. Michigan has Historically been in the Vanguard of States in Providing Due Process Protection for Property Owners in the Special Assessment Context; Notice, Proportionality, a Right to be Heard and a Right to Redress have their Roots in Michigan Due Process Jurisprudence.

Highland's brief correctly and accurately points to the due process underpinnings of the statutory notice and proportionality requirements underlying the Public Improvements Act. Their reliance on *Allen v Wayne Co*, 338 Mich 210; 200 NW2d 628 (1972) (addressing practical requirements of notice principles); *Kadzban v City of Grandville*, 442 Mich 495, 501-02; 502 NW2d 299 (1993) (stating that special assessments that lack proportionality are "akin to the taking of property without due process of law"); and *Dixon Road Group v Novi*, 426 Mich 390; 395 NW2d 211 (1986) (holding that special assessments require proportionality), are all accurate and on the mark. In addition, these principles are employed in other noteworthy Michigan assessment cases this Court should consider.

Michigan provides an early example of special assessments being struck down under constitutional due process principles in *Thomas v Gain*, 35 Mich 155; 24 Am Rep 535; 1876 WL 7211 (1876).[8] *Thomas v Gain*, which is still cited in modern times,[9] addressed the issue of the constitutionality of a statute assessing sewer taxes calculated on the basis of property surface area. It also addressed the issue of whether the assessment may be made administratively, "without giving the parties concerned an opportunity to be heard." 1876 WL 7211 at *2. As foreshadowed in the

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[8] Michigan Reporter point page references unavailable; point page references are made to Westlaw online version for convenience.

[9] See, e.g., *Bolema v City of Norton Shores*, Docket No. 220781; 1998 WL 440915 (Mich Tax Tribunal, Apr 2, 1998); McQuillan, Law of Municipal Corporations (2006), § 20.09.

discussion of *Village of Norwood v Baker* above,[10] Justice Cooley found that assessing sewer improvements based on overall lot area, and not in accordance with benefits conferred, was unconstitutional. 1876 WL 7211 at *6. Likewise, an assessment made administratively, without the minimal opportunity for the property owner to be heard, is unconstitutional. *Id.* In considering the question, Justice Cooley, relying on cases from our sister states, articulated various bedrock principles that are still in force today. First, it is clear that assessments may not be apportioned "on any basis whatsoever which the legislature may see fit to prescribe." *Id.* at *4. Further, "it is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses." *Id.* Further still, where the apportionments does not justly distribute the burden, based on the "proximate justice as is usually attainable in tax cases," it "must fall to the ground, like any other merely arbitrary action which is supported by no principle." *Id.* at *4. Justice Cooley also observed that where the benefits outweigh the burdens, or parties marginally benefitted are assessed the same amount as parties who are substantially benefitted, "it is manifest that it may not only work injustice, but that in some cases it may amount to actual confiscation." *Id.* at *5. When such "injustice must result from its adoption, we have no alternative but to reject the assessment as an unlawful exaction." *Id.* (citing cases). Justice Cooley also held that parties must have a right to a hearing before an assessment shall become an established charge or lien against the property. *Id.* at *6.

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[10] The U.S. Supreme Court relied on and quoted *Thomas v Gain* and *Norwood.* 172 US at 285-86.

Similarly, in *Crampton v Royal Oak*, 362 Mich 503; 108 NW2d 16 (1961), this Court, relying on past Michigan precedent and secondary sources, quoted with approval the following passage from American Jurisprudence:

> The rule or standard of assessment sufficient to satisfy the constitutional guaranty of due process of law is furnished by a statute which, as interpreted by the Supreme Court of the state, provides that a municipal council may assess the whole, or such part as it may deem just, of the cost of a local improvement, upon such lands in the vicinity thereof as are benefitted thereby, and limits the amount of the assessment upon each lot to the amount of benefits.

362 Mich at 524 (quoting 48 Am Jur 618). The result in *Crampton* was to reverse the decree, insofar as the assessment was based on pre-existing valuations of certain parcels, and insofar as the assessment amount was not in accordance with the benefits conferred.

Similarly, with an emphasis on notice principles, the Michigan Supreme Court held that notice of a hearing concerning objections to a special assessment roll provided only by newspaper publication offended the federal and state due process clauses, and thus set aside the lower court decree that affirmed the procedure. *Ridenour v Bay County*, 366 Mich 225; 114 NW2d 172 (1962). *Ridenour* again confirms the basic principle that deprivational acts taken by the government without notice are, in effect, a nullity. A similar result was found in *Trussel v Decker*, 147 Mich App 312; 382 NW2d 778 (1986), where, under the Public Improvements Act, MCL 41.721 et seq, when the notice of public hearing inaccurately apprised property owners (i.e., those subject to the deprivation) of their rights to object or otherwise respond in connection with the pending assessment, due process guarantees were violated. In simple terms: no notice, or inappropriate notice of a deprivational government action renders the action a nullity.

Consistent with this Michigan precedent (similar to the U.S. Supreme Court precedent described above), there is simply no way that the actions of the Township in this case may be affirmed. There is simply no way that a change in the benefits conferred as significant as occurred in this case can simply "fall through the cracks" of meaningful court review because the change in plans occurred more than 30 days after initial confirmation of the special assessment roll. Irrespective of the terms under which Highland's numerous challenges to these activities were raised (i.e., whether Highland pleaded due process violations, violations of the Public Improvements Act, contract-based claims, or all of these), it is truly remarkable that the Tax Tribunal, circuit courts and the Court of Appeals managed to overlook or miss the Township's factually-stipulated due process violations, and remain incapable of crafting a remedy. Fortunately, as discussed below, this Court has ample tools and legal authority with which it may craft a remedy for these clear due process violations.

B. THIS COURT HAS AMPLE POWER AND AUTHORITY TO FASHION THE APPROPRIATE REMEDIES IN THIS CASE, EITHER PURSUANT TO STATUTE, DUE PROCESS PRINCIPLES, OR GENERAL EQUITY POWERS.

1. Highland Is Correct; the Public Improvements Act, If Read Consistently with its Due Process Underpinnings, Allows Courts "Of Competent Jurisdiction" to Fashion Appropriate Remedies.

Under the Public Improvements Act, courts of "competent jurisdiction" may declare an assessment "void," which allows the assessing body to reassess within lawful parameters. MCL 41.724a(5). Similarly, assessments may be "invalidated" by a court fo competent jurisdiction. MCL 41.725(3) (triggering action where levy "is found to be invalid"). The specific remedy of a refund of amounts unlawfully collected is provided as well. MCL 41.732 (refund of assessments

paid in excess of 5% above what was necessary for the project). Finally, Section 13, MCL 41.733, provides a "cure-all" for unlawful action by the assessing body, in that where the assessment is "judg[ed] illegal" (without limitation as to what may have been "illegal"), the assessing body must return to the last lawful step and repeat the assessment process.

Highland has fully and adequately briefed this Court on how existing statutory remedies should be employed to effectuate justice here. Because the Home Builders are not party to this case, it is of no moment whether this Court: deems the Township's 2004 curative ordinance tantamount to "confirmation" of the assessment roll (as amended), thereby making Highland's 2004 Tax Tribunal action both timely and sufficient to address Highland's meritorious proportionality concerns, or takes another approach, such as striking, voiding or invalidating the Township's "day 31" plan alteration, as it was done without notice, and returning the Township to the last lawful step under Section 13 of the Public Improvements Act. MCL 41.733. It is urged in the least, however, that this Court remain mindful of the fact that the parties have already litigated numerous issues and have expended considerable resources below. Thus, a just solution should not require the parties – particularly Highland – to relitigate everything. Instead, the merits of the proportionality issue and the amount of Highland's refund are the only questions that should be addressed should there be any remand here.

2. This Court has Ample Authority to Craft an Appropriate Remedy for Highland Pursuant to Due Process Principles.

Due process jurisprudence in Michigan, sister states, and before the U.S. Supreme Court, provides wide ranging examples of court remedies, and the ordering of rights and procedures for the parties. A survey of this case law illustrates that this Court has wide latitude in creating

remedies; is not bound by statutory constraints; and may exercise its powers to cut through the procedural morass below to reach substantial justice. Further, in several of the cases discussed below, this Court's (or other courts') remedy was analogous to the remedies provided for within assessment statutory schemes. Simply put, this Court has broad curative or remedial powers in the due process context.

Justice Cooley's 1876 opinion in *Thomas v Gain*, 35 Mich 155; 1876 WL 7211 (1876), illustrates this Court's broad remedial powers in the due process and assessment context. The case was originally filed in equity, in pursuit of an injunction to restrain a city official fro enforcing a lien on real property by executing on personal property of the property owners. 1876 WL 7211 at *6. Upon finding due process violations based on a lack of proportionality in the assessment, and a lack of redress (the assessment amount was set administratively, without opportunity for a hearing), *Id.* at 2, 3, Justice Cooley noted that this case was more akin to an action to quiet title, ordered the city joined as a defendant, and effectively ordered the lien extinguished. *Id.* at *6. In so doing, and in the interest of justice, the historical equitable doctrine that required a party to first pay taxes under protest prior to seeking a refund or challenging the tax was not applied here. *Id.* Indeed, to the extent that the Supreme Court did not do anything to prevent future assessment and levy – provided that it met with due process notice, redress and proportionality principles – this relief was similar to that now afforded under Section 13 of the Public Improvements

Act. MCL 41.733. The Court basically returned the parties to the last lawful step, allowing the city to move forward consistent with due process.[11]

Further, the U.S. Supreme Court relied on Justice Cooley's opinion in *Thomas v Gain* in formulating relief in a due process/proportionality case. *Village of Norwood v Baker*, 172 US 269, 286 (1898) (citing *Thomas v Gain* for proposition that unconstitutional special assessments are void).

In *Crampton v Royal Oak*, 362 Mich 503; 108 NW2d 16 (1961), in the face of a due process proportionality challenge to special assessments intended to improve a downtown shopping district, 362 Mich at 508-09, this Court reversed the trial court, directing it to modify its decree to "set aside the assessment," and ordered the "defendant to substitute therefor a new assessment prepared on the basis of the benefits received by each parcel . . . ." *Id.* at 527. Again, consistent with due process, and without reliance on any statutory procedure, this Court essentially declared the disproportionate assessment a nullity and required the city to return to the last lawful step in the procedure before reassessing.

One year later, in an opinion that relied upon both due process and equitable principles, this Court again remanded the matter to the trial court, with directions that the defendant proceed from the last lawful step of the proceedings. *Ridenour v Bay County*, 366 Mich 225; 114 NW2d 172 (1962). Further, this Court completely disregarded the 30-day appeal requirement in a

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[11] *Thomas v Gain* also shows, through this Court waiving the equitable requirement of making challenged tax payments under protest, that this Court has considerable authority to clear procedural hurdles or relieve parties of procedural requirements to ensure due process.

predecessor statute with identical language as the current Public Improvements Act. 366 Mich at 234; 366 Mich at 234, n. 1.

At issue in *Ridenour* was the constitutionality of an assessment based on notice by publication. This Court, in reversing the trial court and finding that notice by publication violated the property owners' due process rights, held that "the board will be required to make new assessments." *Id.* at 247. In other terms, without reference to statute, this Court returned the defendant to the last lawful step in the process.

Perhaps most remarkably, in *Ridenour*, the plaintiffs here filed their case, in equity, more than 60 days after confirmation of the assessment roll. *Id.* at 234. This adds credence to Highland's various theories to the effect that the 30-day filing deadline does not apply to due process challenges or, alternatively, must be waived when the municipality violates the otherwise orderly set of procedures mandated under the Public Improvements Act.

3. This Court has Ample Authority to Craft an Appropriate Remedy for Highland Pursuant to Equitable Principles.

As the U.S. Supreme Court stated over a hundred years ago, in a due process/ proportionality claim: "equity may properly interfere to restrain the operation of this unconstitutional exercise of power. *Village of Norwood*, 172 US at 292 (quoting *Van Norden v Morton*, 99 US 378 (1878) (internal quotations omitted). This maxim still rings true. More recently, in a desegregation case, the Supreme Court stated that "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman v Pitts*, 503 US 467,

487 (1992). Indeed, this Court has a host of equitable powers that may be brought to bear to reach substantial justice here.

Indeed, the numerous procedural devices available to this Court under MCR 7.316 (miscellaneous relief obtainable in the Supreme Court) speak to these broad powers. These include exercising all powers of amendment as the trial court, and granting relief "as the case may require . . . ." *Id.* Further, irrespective of the specific causes of action Highland may have pleaded at various stages below, this Court (and the Court of Appeals) are free to look beyond procedural labels to determine the gravamen of an action or the exact nature of the claim. *Parkwood Ltd v State Housing Development Authority*, 468 Mich 763, 744, n 8; 664 NW2d 185 (2003) ("nature of the claim, rather than how the plaintiff phrases the request for relief, controls how a court will characterize the claim"); *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (same principle applied in medical malpractice context). Moreover, where (or to the extent) the proper course is not made clear by statute, or where a statute may be silent, this Court (and the Court of Appeals) may fill the gaps with common law principles. *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 20; 651 NW2d 356 (2002) (Court relies on common law in face of legislative silence concerning standard of care for nurses); *Dalton Twp v Muskegon County Board*, 223 Mich App 53, 57; 565 NW2d 692 (1997) (in absence of statute addressing particular street abandonment question, court may rely on common law). In other terms, this Court has the power and authority to reach substantial justice under its numerous equitable powers.

For example, in *City of Pleasant Ridge v Royal Oak Twp*, 328 Mich 672; 44 NW2d 333 (1950), this Court effectively cut through[12] complex statutory schemes, in the assessment context, to reach substantial justice. In *Pleasant Ridge*, this Court was confronted with a situation where, from 1926 through 1928, Royal Oak Township created 35 special assessment districts (water and sewer) pursuant to the then-operative statutory scheme. 328 Mich at 678-79. The Township issued and sold bonds to finance the project. *Id.* at 679. Subsequent to the bond issue, sixteen portions of township territory were either annexed to eight different cities, or otherwise incorporated as villages. *Id.* at 679. Then, the Great Depression and various state tax moratorium statutes intervened. *Id.* at 679-80.[13] Matters were further compounded for the township when the state seized and sold considerable property subject to the assessments for delinquent state taxes, thereby selling them free of the lien or indebtedness arising under the original special assessments. Needless to say, the township's anticipated revenue stream, intended to retire the bonds, dried up. *Id.* at 681. Further, there was no statutory scheme that would allow the township to reassess benefitted properties that were now within other municipal corporations. *Id.* at 683.

However, twenty-some-odd years after the initial assessments, with little more than fairness or equity as its guide, this Court ordered the municipalities that acquired assessment district lands to use whatever available revenue they had to try to retire the bonds and to reassess the improved properties and dedicate that funding to retiring Royal Oak Township's original bonds. *Id.* at 688-89. This Court required the parties (in clear homage to special assessment proportionality

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12 Repeated references to municipalities paying their "just proportionate share" and having an "imperative duty" to do so, 328 Mich at 682, make it clear that this Court was relying on general fairness and equity considerations to reach a just result.

13 There were no tax sales in Oakland County between 1932 and 1938. *Id.* at 680.

requirements) to refer to the original assessment rolls to ensure the burden was imposed in proportionate amounts. *Id.* at 688. Further, the Court indicated that if the parties did not comply, a writ of mandamus would issue to compel compliance. *Id.* at 689.

The operative lesson from *Pleasant Ridge* is that where there is a palpable injustice, and statutory governance is unclear, this Court may – despite the passage of years – reach an equitable and fair result.[14]

IV. CONCLUSION AND RELIEF REQUESTED

The Home Builders are not party to this litigation and have no specific opinion concerning the best manner in which to grant relief to Highland. As such, the Home Builders rely on Highland's requests for relief in this matter and trust this Court to reach a result which is an appropriate remedy for the Township's glaring due process violations.

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[14] There is precedent in sister states for the general proposition that appellate courts may cut through a complex procedural posture of a case and reach substantial justice. See, e.g., *Sears v City of Columbia (MO),* 660 SW2d 238 (Mo App, 1983). In *Sears*, the trial court invalidated tax bills where no benefit was found; declared unconstitutional and nullified various city ordinances passed in connection with a street-widening project; and generally cut through a procedural morass that involved, *inter alia*, ten-year old condemnation actions and a city defense to the effect that the current case was a collateral attack on these cases. In formulating its remedy, the Missouri appeals court relied on Michigan case law. 660 SW2d at 256, n 7 (relying on *Brill v Grand Rapids*, 383 Mich 216; 174 NW2d 832 (1970); *Fluckey v Plymouth*, 358 Mich 447; 100 NW2d 486 (1960), and several others).

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